

YAVAPAI COUNTY ATTORNEY'S OFFICE
JOSEPH BUTNER, SBN 005229
DEPUTY COUNTY ATTORNEY
255 East Gurley Street
Prescott, AZ 86301
Telephone: 928-771-3344
ycao@co.yavapai.az.us

125 **FILED**
O'Clock *7* M
SEP 24 2010
JEANNE HICKS, Clerk
BY **HEATHER SMITH**
Deputy

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

v.

STEVEN CARROLL DEMOCKER,

Defendant.

Cause No. P1300CR20081339

STATE'S RESPONSE TO DEFENDANT'S
MOTION TO DISMISS WITH
PREJUDICE AND OR MOTION TO
DISQUALIFY THE YAVAPAI COUNTY
ATTORNEY'S OFFICE.

Honorable Warren Darrow
Division 6

FILED UNDER SEAL

The State of Arizona, by and through Sheila Sullivan Polk, Yavapai County Attorney, and her deputy undersigned, hereby requests that the Defendant's pleading titled Notice of Developments Related to Ethical Rule 1.7 in reality is a motion to dismiss this case with prejudice and or disqualify the Yavapai County Attorney's Office. This motion must be dismissed for the following reasons:

MEMORANDUM OF POINTS AND AUTHORITIES

Motion to Dismiss with Prejudice

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

The Defendant's Notice of Developments Related to Ethical Rule 1.7 is a veiled attempt to shift blame on to the Yavapai County Attorney's Office for the Fraudulent Schemes allegedly committed by their client Steven DeMocker. The "defense team" would like this court to dismiss this case with prejudice or alternatively, disqualify the Yavapai County Attorney's Office because of an [REDACTED]

[REDACTED]

The defendant, on page 3 of his pleading, references a meeting between prosecutors and the defense team on September 21, 2010 at the County Attorney's Office. The defendant states: "At that meeting, counsel indicated that they understood the representatives present needed to speak both with their superiors and with the Yavapai County Sheriff's Office before providing final answers to those questions."

This is a false and misleading statement to the court. At no time did the County Attorneys say they needed to consult with the Yavapai County Sheriff's Office on the pending issue before this court. The Court really needs to question the motivation of the defendant's attorneys in the need to make false and misleading statements in their pleadings. Of course the implications in making false and misleading statements is supposedly the very issue they claim to have been distracted by this past week.

The Yavapai County Sheriff's Office [REDACTED]

[REDACTED] It is the defendant's fraudulent schemes and manipulation of evidence that is the core issue here. It is not the actions of the Count Attorney or the County Sheriff's [REDACTED]

[REDACTED] that this Court should focus on. The defendant's motion for dismissal of this case

1 with prejudice based upon his fraud schemes can not seriously be entertained on any rational
2 level.

3 The Defendant's counsel has repeatedly attempted to use this manufactured evidence
4 in trial. Any entity or person has the right to [REDACTED]
5 [REDACTED] While the County Attorney had no involvement in
6 Sheriff's Waugh's [REDACTED], it is up to the [REDACTED] to decide what course
7 of action to take. Any further discussion of [REDACTED] has no place in this
8 trial.
9

10 Vicarious Disqualification of YCAO

11 It is well established that "Arizona Courts 'view with suspicion motions by opposing
12 counsel to disqualify a party's attorney based upon conflict of interest or appearance of
13 impropriety ...'" State ex rel. Romley v. Superior Court (Flores), 181 Ariz. 378, 891 P.2d
14 246 (App. 1995). The Arizona Supreme Court has cautioned that a party should not be
15 allowed to interfere with her opponent's attorney-client relationship except "in extreme
16 circumstances. . ." Villalpando v. Reagan ex. rel. Mesa City Prosecutor's Office, 211 Ariz.
17 305, 308 (citing Alexander, infra).
18

19 In State v. Lucas, 123 Ariz. 39, 597 P.2d 192 (App. 1979), the Arizona Court of
20 Appeals addressed a related issue and rejected the defendant's argument that the entire Pima
21 County Attorney's Office should be disqualified because the office was also defending the
22 board of supervisors in a civil rights action filed by the defendant. As support for his claim,
23 the defendant argued there was at least an appearance of impropriety because the county
24 attorney had withdrawn a plea agreement about the same time the federal suit was filed, even
25
26

1 though the prosecutor avowed the withdrawal of the plea agreement was unrelated to the
2 filing of the federal suit. In rejecting the defendant's argument, the Lucas court held:

3 Disqualification of a prosecutor's office is within the discretion of the trial
4 court and will be overturned only if the discretion is abused. [citation
5 omitted.] Where disqualification has been ordered, the facts generally reveal
6 intense personal involvement of prosecuting attorneys in the very cases they
are called on to prosecute. No such involvement has been shown and the trial
court did not abuse its discretion in denying the motion. [citations omitted.]

7 Where disqualification [of an entire prosecutor's office] has been ordered, the
8 facts generally reveal **intense personal involvement** of prosecuting attorneys
9 in the very cases they are called on to prosecute. See, e. g., *People v. Superior*
10 *Court of Contra Costa County*, 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d
11 1164 (1977); Cf. *State v. Thomason*, 353 So.2d 235 (La.1977). No such
involvement has been shown and the trial court did not abuse its discretion in
denying the motion. [citations omitted.]

12 Id. at 123 Ariz. 41, 597 P.2d 194 (emphasis added).

13 "Personal involvement" as defined in this context is something distinctly different
14 than the "personal interest" allegation tossed around by the defendant. In State v. Hurley,
15 176 Ariz. 330, 861 P.2d 615 (1993), the personal involvement the Arizona Supreme Court
16 was concerned about was the prosecutor's former representation of defendant in two criminal
17 cases, both of which were used in the case he was then prosecuting. That court (and most
18 other cases addressing this issue) was clearly worried about the communication of
19 confidential client information. That is not the issue here to any degree.

20
21 Our Supreme Court, before outlining the legal balancing test to be applied to such
22 situations, stated the following:

23 We are, then, only concerned with the "appearance of impropriety," and the
24 question we have before us is whether an appearance of impropriety alone
25 will give a party standing to interfere with an adverse party's choice of
26 counsel. We agree with the line of cases that have applied a stricter scrutiny
when reviewing possible Canon 9 violations as a basis for disqualification.
See Board of Education of New York City v. Nyquist, 590 F.2d 1241, 1247
(2d Cir.1979) ("when there is no claim that the trial will be tainted,

1 appearance of impropriety is simply too slender a reed on which to rest a
2 disqualification order except in the rarest of cases"); *Woods v. Covington*
3 *County Bank*, 537 F.2d 804, 819 (5th Cir.1976) ("Inasmuch as attempts to
4 disqualify opposing counsel are becoming increasingly frequent, we cannot
5 permit Canon 9 to be manipulated for strategic advantage on the account of
6 an impropriety which exists only in the minds of imaginative lawyers") . . .

7 . . .

8 We believe that the court, when considering a motion for disqualification
9 based upon the appearance of impropriety, should consider the following: (1)
10 whether the motion is being made for the purposes of harassing the defendant
11 [The State in this case], (2) whether the party bringing the motion will be
12 damaged in some way if the motion is not granted, (3) whether there are any
13 alternative solutions, or is the proposed solution the least damaging possible
14 under the circumstances, and (4) whether the possibility of public suspicion
15 will outweigh any benefits that might accrue due to continued representation.

16 Alexander v. Superior Court In and For Maricopa County, 141 Ariz. 157, 165, 685 P.2d
17 1309, 1317 (1984).

18 The test in Alexander was improperly applied by the trial court in State ex rel. Romley
19 v. Gottsfield, 171 Ariz. 195, 829 P.2d 1241 (App. 1992). This case is particularly instructive
20 for [REDACTED] In that decision, the Arizona Court of Appeals held the trial court abused
21 its discretion in vicariously disqualifying the entire Maricopa County Attorney's Office
22 based on prior contact between the defendant's counsel in a first degree murder case and a
23 deputy county attorney who was previously his partner during the time of defendant's case.
24 It is necessary and appropriate to quote extensively from that decision here:

25 In attempting to balance the interests of the state and the defendant, the
26 appearance of impropriety is important. However, along with that element,
we should look to whether the motion is made for harassment, whether the
party seeking disqualification will be damaged if the motion is not granted,
whether there are alternative solutions to disqualification which would be less
damaging to the parties, and whether the possibility of public suspicion
outweighs any benefits that might accrue due to continued representation. *Id.*;
Alexander, 141 Ariz. at 165, 685 P.2d at 1317. We consider the severity of
the charges, the complexity of the case against the defendant, the number of
lawyers in the prosecutor's office, the role that the deputy county attorney had

1 both with the defendant before the prosecution and thereafter, and how
2 deeply the prosecutor was involved in the prior and present prosecution.
3 When one looks at the total record in this case the contact, if any, was not
4 significant. [The prosecutor] simply had no association with [defendant] of
5 any meaningful kind, and certainly was not privy to any statements made by
6 [defendant] to his lawyer. What knowledge existed concerning the
7 participants in the case was insignificant. It was on a total basis that we came
8 to the conclusion that we did in *Turbin* [to vicariously disqualify the entire
9 prosecutor's office].

10 In deciding issues of vicarious disqualification, we accurately said in *Turbin*
11 that it is impossible to formulate a bright-line rule. It was the trial judge's
12 feeling that the disqualification of the entire office was appropriate given the
13 close association between [defendant's attorney] and [the prosecutor], the
14 testimony of [defendant's attorney] concerning general discussions of some
15 sort concerning witnesses in the case, and the severity of the charges.

16 Yet, we do not find any evidence in the record that specific confidences were
17 shared, that the court considered alternative solutions which might have been
18 less onerous than disqualification of an entire public office, that the court
19 considered the position of [the prosecutor] in relation to the size of the office
20 disqualified, whether [the prosecutor] actually participated in the defense of
21 [defendant], or the simplicity or complexity of the case to be tried. Also, the
22 record reveals no evidence concerning whether any actual prejudice would
23 result from a failure to completely disqualify the entire prosecution office.
24 Rather, the record can only support the conclusion that no prejudice was
25 suffered by the defense, that [the prosecutor] was not a supervisor of the
26 prosecutor of [the defendant], that [the prosecutor] was in a different section
than the one charged with prosecuting homicides, that the size of the county
attorney's office was large, and that no damage would result to the defense if
the entire office was not disqualified. On balance, the appearance of
impropriety was slight in view of the other elements that should have been
considered. We feel a disqualification of an entire public office the size of the
Maricopa County Attorney's was an abuse of the trial court's discretion.

21 Id. at 171 Ariz. 197-198, 829 P.2d 1243-1244.

22 Clearly under the law and facts presented her, there is absolutely no basis to remove
23 the YCAO from prosecuting this defendant. The record is simply devoid of any evidence
24 that justifies the removal of prosecutors Butner and Paupore and the vicarious
25 disqualification of the entire Yavapai County Attorneys Office.
26

According to the court in Alexander, *supra* this court should analyze this motion for disqualification based upon an allegation of the appearance of impropriety as follows: (1) to consider that the Motion by Defendant had been filed for purposes of harassment because there is no evidence that continued YCAO involvement will harm Defendant; (2) to consider that no attorney-client confidences could be betrayed; (3) to consider that the record reveals no evidence of actual prejudice resulting from failure to disqualify the assigned prosecutors and the entire YCAO; (4) to consider that, "on balance the appearance of impropriety if any at all is slight; (5) to consider "whether the possibility of public suspicion outweighs any benefits that might accrue due to continued representation," when there is no evidence of any public suspicion in this case; (6) to "consider alternative solutions that might have been less onerous than disqualification".

Conclusion

The defendant's motion for dismissal of this case with prejudice based upon his fraud schemes can not seriously be entertained on any rational level. This blatant "turn the tables" defense should not be allowed to work.

Defendant's motion is without merit and the State is requesting this Court deny it in its entirety.

RESPECTFULLY SUBMITTED this 24th day of September, 2010.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: _____

Joseph Butner
Deputy County Attorney

COPIES of the foregoing hand delivered this
this 24th day of September, 2010, to:

Office of the Yavapai County Attorney

255 E. Gurley Street, Suite 300

Prescott, AZ 86301

Phone: (928) 771-3344 Facsimile: (928) 771-3110

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

Honorable Warren Darrow
Division 6
Yavapai County Superior Court
(via email)

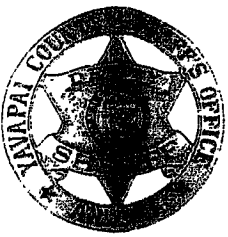
John Sears
511 E.. Gurley St.
Prescott, AZ 86301
Attorney for Defendant
(via email)

Larry Hammond
Anne Chapman
Osborn Maledon, P.A.
2929 North Central Ave, 21st Floor
Phoenix, AZ
Attorney for Defendant
(via email)

Christopher B. DuPont
Trautman DuPont
245 West Roosevelt, Suite A
Phoenix, AZ 85003
Attorney for victims
Katherine and Charlotte DeMocker
(via email)

John Napper
634 Schemmer, Ste 102
Prescott, AZ 86305
Attorney for Renee Girard
(via email)

By: 



YAVAPAI COUNTY SHERIFF'S OFFICE

"Serving Since 1864"

*Steve Waugh
Sheriff*

[REDACTED]

To whom it may concern [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

255 East Gurley Street. Prescott, Arizona 86301 ★ (928) 771-3260 ★ Fax (928) 771-3294

www.ycsoaz.gov

EXHIBIT "A"

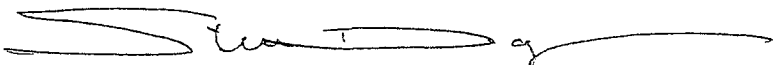
[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Sincerely,



Steve Waugh
Yavapai County Sheriff

Click here for PREBUY!



Trusted local news leader for Prescott, Arizona communities since 1882

dCourier.com dC

The Daily Courier

Home | Classifieds | Coupons | Galleries | Obituaries | Real Estate Search | Subscribe | Phone Book | E-Alerts | RSS
Find It ▾ Blogs ▾ Features ▾ Milestones ▾ Submit ▾ Extras ▾

home latest news local

Share

September 23, 2010

Search

Advanced Search

9/21/2010 10:10:00 PM

Witness alleges DeMocker authored anonymous e-mail



By Linda Stein
The Daily Courier

In an explosive development, the deputy county attorney prosecuting Steven DeMocker for murder disclosed that DeMocker's former girlfriend said that DeMocker wrote an anonymous e-mail claiming that a gang of hit men killed his former wife.

Carol Kennedy, 53, died on July 2, 2008, after a brutal bludgeoning in her Williamson Valley home. As she talked on the phone long distance with her mother, Carol Kennedy suddenly said, "Oh, no," and the call ended. After Ruth Kennedy subsequently could not reach her daughter, she asked the Yavapai County Sheriff's Office to check her condition. A deputy looking in the window of a back bedroom at Kennedy's Bridle Path home saw her body in a pool of blood.



Steven DeMocker

DeMocker, 56, now on trial for first-degree murder, told detectives that he'd been riding his mountain bike that evening along a trail near Granite Mountain. Prosecutors claim that bicycle tire tracks and footprints link DeMocker to the area of Kennedy's house.

The anonymous e-mail that detectives traced to an Internet café in Phoenix came to the inbox of DeMocker's defense lawyer, John Sears, in June 2009. The sender, now alleged to be Charlotte DeMocker, then 17, also tried to send it to Deputy County Attorney Joseph C. Butner III, but had an incorrect e-mail address for him.

In April, arguing for the admission of the e-mail at trial, Sears said that Kennedy's tenant, James Knapp, who suffered from cancer, might have been the target of a prescription drug ring, which led hit men from Phoenix to come to Williamson Valley to kill him. Knapp, who was out babysitting the evening Kennedy was slain, died in January 2009 of a gunshot wound to his chest. The medical examiner ruled his death a suicide.

While Superior Court Judge Thomas B. Lindberg, then handling the case, ruled the e-mail could be admitted as evidence of third-party culpability, Judge Warren R. Darrow reversed Lindberg in a recent decision. That led Sears to file a motion last week asking Darrow to reconsider his ruling so the e-mail could be used as evidence.

At a June 3 hearing concerning the e-mail, Sears said, "There are inherent details inside this e-mail that even the investigator conceded show that the person had some degree of familiarity with the inside of the victim's home beyond what was available in the public record. There are aspects of the allegations in this e-mail that are consistent with our investigation of the physical injuries suffered by Carol Kennedy."

And in a motion, Sears wrote, that the e-mail "contains a detailed description of how and why the murder was committed...and describes a very detailed sequence of events. The e-mail mentions that Ms. Kennedy was in a back bedroom and on the telephone. The e-mail describes two weapons used and what happened to the weapons. The e-mail discusses scene 'staging' which has been alleged by the state at trial."

On Monday Butner, who previously fought to keep the e-mail out of the trial, reversed course, asking to be allowed to use the e-mail in the state's case. DeMocker's former girlfriend, Renee

Recently Commented

Most Viewed

- Column: Breaking down Tea Party directions (11 comments)
- Letter: League does not endorse candidates (3 comments)
- Editorial: Measures should stand on their own (20 comments)
- Witness alleges DeMocker authored anonymous e-mail (29 comments)
- Editorial: Regents take poor aim at scholarships (2 comments)

View Courier pages as printed

weather sponsored by

Get a FREE Gift Card
when you subscribe today!



Are you an informed investor?
Verify BEFORE you buy!

Call the Arizona Corporation Commission's
Securities Division's Investor Protection Hotline,
Toll Free at 1-866-VERIFY-9 (837-4399) Or email info@azinvestor.gov
for more information, to order publications,
or to verify licensure status of a investment promoter.

Girard, gave a statement to detectives Monday saying that DeMocker "prepared the language of the e-mail, showed a handwritten version of the e-mail to (her) during a jail visit prior to June 19, 2009, and then (he) gave the dictated e-mail to his minor daughter, Charlotte DeMocker, with instructions to go to Phoenix and send it from an untraceable location."

"This e-mail now constitutes a statement and confession by the defendant," Butner said in the motion. At an earlier hearing, Butner said that DeMocker told detectives, during an interview after the e-mail surfaced, that he heard the claims made in the e-mail through vents at the Yavapai County Jail in Camp Verde. Although detectives interviewed other inmates, they could not find the prisoner who might have spoken to DeMocker through the vent.

When she's called as a witness, testifying under a grant of immunity, Girard will buttress the state's case. This spring she led detectives to a waterproof getaway bag with clothing and a cell phone that DeMocker hid next to the 8th hole at Hassayamapa golf club, within walking distance from the Alpine Meadows Lane condominium where he lived.

According to previous testimony, DeMocker said that wind blew a mysterious golf club cover that detectives spotted on a shelf in DeMocker's garage into Girard's car. When officers came to retrieve the cover, after an autopsy revealed that a golf club might have served as the murder weapon, it had disappeared. After DeMocker's October 2008 arrest, Sears turned the golf club cover over to authorities.

Also, Butner filed a request asking Darrow to allow a cell phone expert to testify via Skype video link because the U.S. Department of Defense sent the man on a mission to aid the armed forces in Afghanistan. While unable to physically be in court, the video link would allow him to testify remotely.

Darrow held a closed-door hearing with the lawyers Tuesday and the trial may resume on Thursday. DeMocker, who remains in custody in lieu of \$1 million bond, could be sentenced to life in prison if convicted.



Whether you are looking for someone to help an aging parent a few hours a week or more comprehensive assistance, Home Instead can help.

We're by your side so your parents can stay at home

Call for a free no-obligation appointment: 928.708.9960

homeinstead.com/318

Home Instead
SENIOR CARE
To us, it's personal.

Each Home Instead Senior Care® franchise office is independently owned and operated.
© 2009 Home Instead, Inc.

Reader Comments

Posted Thursday, September 23, 2010

Article comment by: **Parker Anderson**

Sounds like "Get A Grip" needs to get a grip.

Posted Thursday, September 23, 2010

Article comment by: **Get a Grip**

A REVIEW OF COMMENTS.... AND MY COMMENTS ARE IN CAPS.

Posted Wednesday, September 22, 2010

Article comment by: **To Takes the Cake !!!**

I think you should really shut your mouth. The other girlfriends you are talking about are coming forward, and until you get the whole story keep quiet. This is an ongoing trial, do you think perhaps they haven't been called to testify yet! Think before you type!

THIS IS A VERY DEFENSIVE RESPONSE!! DOES THAT TELL YOU ANYTHING? AND JUST WHO

COMMERCIAL BEST BUYS PRESCOTT

WWW.NRSRealEstate.com



INFO CALL 1.800.896.7004 EXT. 1102



INFO CALL 1.800.896.7004 EXT. 1252



INFO CALL 1.800.896.7004 EXT. 1092



Purvis • Jackson • Nimmo • Collins

928.445.7000

NATIONAL REALTY OF PRESCOTT

Prescott Business Center

222 W. Gurley St. • Prescott, AZ

Ask The Editor



The Daily Courier Editors

Prescott Newspapers, Inc.

Expertise: Newsroom managers

Prescott, Arizona

928-445-3333

Q: *I was just looking at today's paper (Courier) and saw 3 different articles in it that were not on the interactive website today? Does the Courier not put all the stuff that's in the paper on the website?

A: The printed Courier will always contain more by it's very nature. We post all locally-written stories and features on...

Q: * Why no follow up on Emmett Trapp? What was the cause of death? Is the Sheriff's Office making changes to their search and rescue policy? Was the fact the father was a former cop the reason it was handled more like a crime area?

A: Editor Tim Wiederaenders answered: We continue to follow this story. You raise some valid and interesting questions....